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IN THE

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1895.

No. 953.

EUGENIA CRIMP, EXECUTRIX, &C.,
*Appellant,*

*vs.*

McCORMICK CONSTRUCTION COMPANY ET AL.,
*Appellees.*

On Petition for Writ of *Certiorari.*

## STATEMENT AND ARGUMENT IN BEHALF OF THE APPELLANT AND PETITIONER.

JNO. N. JEWETT,
*Of Counsel for Petitioner.*

BARNARD & MILLER PRINTERS CHICAGO.

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# Supreme Court of the United States.

OCTOBER TERM, A. D. 1895.

No. 251.

EUGENIA CRIMP, Executrix, &c., *Appellant,*

*vs.*

McCORMICK CONSTRUCTION COMPANY et al., *Appellees.*

On Petition for Writ of *Certiorari.*

## STATEMENT and ARGUMENT IN BEHALF OF THE APPELLANT and PETITIONER.

In the cases of *Lau Ow Bew, Petitioner*, 141 U. S., 583, and *Lau Ow Bew* v. *United States*, 144 U. S., 47; *In re Woods, Petitioner*, 143 U. S., 202, and *American Construction Co.* v. *Jacksonville Ry. Co.*, 148 U. S., 372 and, perhaps, others in which this court has considered the question of its jurisdiction in cases sought to be brought before it by *certiorari* under the 3d paragraph of the 6th section of the Act of March 3, 1891, it has been held (using the following or equivalent language) that it is "a branch of its jurisdiction, which should be "exercised sparingly and with great caution, and only "in cases of peculiar gravity and general importance, or "in order to secure uniformity of decision." This language, which is taken from the case in the 148 U. S.,

p. 383, must be considered in connection with the words employed in the case in 144 U. S., p. 58, where it is said that "it is competent for this court by *certiorari* to "direct any case to be certified, whether its advice is "requested or not, except those which may be brought "here by appeal or writ of error," and the result is that whilst the court, upon applications like the present, will exercise its authority cautiously and sparingly, yet that authority, under the law, is broad enough to cause to be brought before it by *certiorari* (the amount in controversy being sufficient) any case which cannot be transferred to it by appeal or writ of error.

It is frankly admitted that the present case involves no question of public or general concern, except as it may be said, and said rightly, that it is a matter of public interest, that every controversy between citizens, which comes before any court for adjustment, should be settled and the judgment of the court rendered in accordance with the rights of the parties and the established principles of the law. If the question of amount involved can be considered as included in the words "peculiar gravity," it may be suggested that the importance and *gravity* of amounts are relative. The amount here in controversy is $25,200, a small matter to a man whose fortune is counted by millions of dollars, but of vast moment to the petitioner, since it is substantially all that she has or can hope to have for her future support and protection.

A few words about the cases above referred to may be permitted. In the Chinese case (141 U. S.) the writ of *certiorari* was allowed, because there was involved the construction of an important act of Congress and treaty relations of the United States with China. The case in

144 U. S., I assume, is the same case upon final hearing. The case of Woods, 143 U. S., involved a judgment of only $3,800 and costs, and the application of certain rules of decision or practice in the State court of Minnesota. And it was held that the questions were not of such "gravity and general importance as to re-"quire the review of the conclusions of the Circuit "Court of Appeals in reference to them."

In the Construction Company case, 148 U. S., and the case decided with it, the prayer of the petitioners was alternative for a writ of *certiorari* or mandamus. The mandamus was denied in both cases, and the *certiorari* in one. The *certiorari* was allowed upon the single question of the right of a circuit judge to sit in the Court of Appeals upon the hearing of a cause in the decision of which he has participated at the Circuit. In other respects the petitioners sought to have this court review interlocutory orders of the lower courts, contrary to what has been the settled doctrine of this court for more than half a century.

The result of my reading of these cases is simply this. I do not find in them any principle or rule of practice which should close the eyes of this court to the record now presented for its examination and review. I assume that if the amount involved were $1,000,000, or $500,000, or even $100,000, the gravity and importance of the case would be conceded. The men who deal in such large amounts are comparatively few. To the vast majority of our citizens the sum of $25,000 seems a magnificent fortune, and to be deprived of it, when once in possession, an overwhelming misfortune.

One thing more may properly be suggested in this connection. The present case involves no complication

of facts. There is no conflicting testimony to be considered and reconciled. Indeed the petition, including the exhibit attached, presents the substance of the case. Beyond this it is only necessary to consider a few facts stated in the pleadings and the rulings of the court by which the claim of the petitioner for $25,200 was wholly disallowed. The principal question is the proper construction of the agreement, a copy of which is made a part of the petition as "*Exhibit A*." It is claimed that the agreement belongs to that class of written instruments which requires *construction* as distinguished from mere *interpretation*, and that neither the Circuit court nor the Court of Appeals exercised reasonable intelligence in this regard or gave attention to the general and established rules which are applicable in such cases—that they attempted interpretation only when interpretation must fail and lead to wrong conclusions, and that this is apparent in the opinions of the Court of Appeals, set out in the transcript of the record. These are of such a character and quality that I am unwilling to admit that they are entitled to any presumptions in their favor. In this respect the case is both peculiar and important. How the learned judges of that court could have been induced to adopt the method of investigation which they pursued, is not easily understood. That they erred both in method and result is confidently asserted. Possibly this could be satisfactorily shown in much less space than I shall occupy; but the importance of the case to my client, and the fact that the Circuit Court of Appeals has twice misunderstood (as I think) the agreement, seems to make necessary an extended analysis of the instrument in connection with the rulings of the court thereon, for the length of which I make my apology in advance.

## STATEMENT.

The litigation here involved was commenced in the United States Circuit court for the Northern district of Illinois on the 4th day of December, 1894, by the filing of a bill in that court in which the present petitioner was complainant, and the McCormick Construction Company and R. P. McCormick were made defendants, the complainant being a citizen of the State of Illinois, and the defendants citizens of the State of Missouri. As disclosed by the bill, the causes leading up to the litigation thus inaugurated had their foundation in an agreement entered into on the 24th day of July, 1893, between the McCormick Construction Company and R. P. McCormick, as party of the first part, and W. G. Crimp, the testator of the complainant, the circumstances of its execution and the misfortunes resulting from its nonperformance. That agreement is appended to and made a part of the pending petition. The bill alleges fraudulent concealment and deceitful practices on the part of the defendants to induce Crimp to enter into the agreement, misappropriation of the moneys contributed by Crimp to the enterprise contemplated by the agreement, and a mismanagement and abandonment of that enterprise by the defendants during the illness of said Crimp, with which he was stricken down shortly after the agreement was signed, and of which he died on or about the 15th day of November, 1893, less than four months after the signing of the paper. The prayer of the bill was formally for a decree setting aside the agreement and for a restoration of the moneys advanced by Crimp under the agreement, being about the sum of $28,000, or for such other relief as should be equitable. An answer

was prayed for, but not under oath, the oath of defendants thereto being waived.

An answer was filed by the defendants, in general denial of the alleged frauds and fraudulent practices on their part, admitting, however, that McCormick applied upwards of $10,000 of the money furnished by Crimp to the payment of a debt owing to him by the Construction Company, alleging it to have been done with Crimp's consent, and also that he drew out of the bank $7,400 a day or two before Crimp's death, of which he was robbed whilst he was unconscious from the effect of drugs administered to him by unknown persons. The answer also charges Crimp with improper conduct and collusion with others to defeat the purposes of the agreement. It admits, however, that Crimp was taken sick about four weeks after the agreement was signed; but whether he died or not, the defendants profess to have no knowledge or information. The answer also admits that the enterprise contemplated in the agreement of July 24, 1893, had been abandoned, that the Construction Company had executed chattel mortgages upon its personal property in favor of some of its creditors, and that other creditors were pressing for payment, and that Crimp and the complainant had failed and refused to furnish assistance to enable the Construction Company to prosecute the enterprise.

On the day the bill was filed, and upon an ex parte application and showing made by the complainant, the Circuit court appointed a receiver for the property and assets of the Construction Company, who duly qualified and entered upon the discharge of his duties. The only assets of the company, so far as discovered by the record, which came to the hands and possession of the receiver,

consisted of a few thousand dollars due from the Sanitary District, which was used in payment of laborers, a contract between the Sanitary District of Chicago of the one part and the McCormick Construction Company, of the other part (called hereafter the drainage contract), by which the Construction Company undertook to do certain work upon section 14 of the public work known as the drainage canal or drainage channel; the particular section 14 being in the county of Will, in the State of Illinois, and a lot of machinery, tools, supplies and perhaps other personal property along the line of the section, the latter being subject to certain mortgages, mentioned in the answer, in favor of particular creditors of the Construction Company, and in the possession of such creditors by virtue of such mortgages. The drainage contract was at the time of the filing of the bill in the possession of the complainant, Mrs. Crimp, as executrix of W. G. Crimp, her husband, under the terms and provisions of the agreement of July 24, 1893, between the Construction Company and R. P. McCormick of the one part and Crimp of the other part. The drainage contract and the personal property were, with the consent of the parties interested, taken possession of by the receiver, and afterwards sold by him free of all liens thereon, under an order of the court, which distinctly provided that the claims and liens should follow and attach to the proceeds, as they had formerly attached to the things themselves. At the sale made by the receiver, the drainage contract was sold for the sum of $33,000, and the machinery, tools, supplies, etc., were sold for $8,000, making in all a fund amounting to $41,000, applicable under the orders of the court to the payment of costs and expenses to be allowed by the court, and to distribution amongst creditors, as they should be

found to be entitled to share therein. It is proper to state here, that the $8,000 realized from the sale of the machinery, tools, supplies, etc., is in no way involved in the present controversy. Mrs. Crimp makes no claim upon it, or to participation in it, and for the reason, that the claims of creditors who held the chattel mortgages upon the machinery, etc., out of which said $8,000 was realized, greatly exceed that amount, and no contest has ever been made by her as to the validity of those claims and mortgages. The controversy, therefore, relates solely to the disposition which shall be made of the net proceeds of the sale of the drainage contract. This fund in the hands of the receiver, as is shown by the Master's report (Print. Rec., 140) amounts to the net sum of $27,228.29, whilst the claims of the general creditors (allowing to Mrs. Crimp in that class, the sum of $3,460.84, but excluding entirely her claim of $25,200, which is now the matter of contention) amounts to the sum of $26,862.18 (Rec., 142), practically exhausting the entire fund.

This being the situation, it is unnecessary for the court to investigate those parts of the record which relate to the claims of the general creditors. For the purpose of this hearing, they are admitted to be just claims against the McCormick Construction Company, as reported by the master, and to the amount above stated, with the single exception, that it is not admitted that Mrs. Crimp's claim for $2,720.84, part of the $3,460.84, allowed in the class of general indebtedness, belongs in that class; but it is insisted that it, as well as her further claim of $25,200, which was wholly rejected, is secured by the pledge of the drainage contract, and therefore entitled to preference in payment out of the fund arising from the sale of that contract.

The issue to be tried is thus clearly defined, and it only remains to follow the history of the case a little further before coming to the discussion of it.

The record discloses the fact (Rec., 41) that on the 3d day of January, 1894, Mrs. Crimp filed in said cause an amended and supplemental bill, making new parties defendant, viz: the Ingersoll-Sergeant Rock Drill Company, Moses P. Johnson Machinery Company, M. Parker, Melcher and Ingraham, corporations of the States of New York, Missouri and Indiana, respectively, and the Northwestern National Bank of Chicago, a corporation under the laws of the United States. These new defendants are the claimants under the chattel mortgages, already referred to, and the amended and supplemental bill brings them into court because of the liens claimed by them under said mortgages upon the machinery and other personal property of the McCormick Construction Company. It also, by way of supplement, sets out the offers made to the receiver for the purchase of the drainage contract and the personal property, and prays that the offers be accepted and the sales completed, and that the liens thereon, whatever they may be, be transferred to the purchase money. The new defendants answered, claiming their lien under the mortgages, and substantially joining in the prayer of the bill. All the other general creditors came in by intervening petitions, or under the general order of the court for the presentation and proof of claims before the master.

On July 10, 1894, the following order was entered by the court (Rec., 88): "It is ordered by the court, "that the issues framed by the pleadings, relating to "Crimp's claim be referred to William M. Booth, "one of the masters of this court, to investigate and

" report with his findings thereon, within twenty days." The report of the master immediately follows that order. It appears from that report, that no evidence was offered before the master on either side, except the agreement between the Construction Company and McCormick of the one part and Crimp of the other part, of July 24, 1893, a copy of which is attached to the pending petition as " Exhibit A," and upon that agreement alone, the master proceeded to make his findings and report. The agreement and the exhibit thereto, and an added paragraph, are set out in full. (Rec., 89 to 95.) The report concludes with the following findings:

" 1. That in executing the agreement of July 24th, " 1893, hereinbefore set forth, *it was the intention* of the " parties thereto that W. G. Crimp should become, and " that he did become, in the full sense, a stockholder in " the McCormick Construction Company.

" 2. That the alleged pledge of the said Drainage " contract to secure the repayment to Crimp of any sums " advanced in pursuance of said contract of July 24, " 1893, was and is illegal and void as against creditors " of the McCormick Construction Company.

" 3. That the complainant is not entitled to have her " claim rank as a preferred claim against the proceeds " of the sale of the Drainage contract.

" 4. That the complainant is not entitled to rank as " a general creditor of the said McCormick Construction " Company, and that she has no right to share in the " assets of said corporation until all its *bona fide* credi- " tors have been paid in full."

Exceptions were filed by the counsel for Mrs. Crimp to the report and findings of the master, which were overruled by the court, and the report confirmed, and

this ruling was maintained during the further progress of the case, with the exception that Mrs. Crimp was allowed a claim as a general creditor to the amount of $3,723.34, less Mr. Booth's master's fees, $262.50, the net allowance being $3,460.84, before mentioned. The further claim of Mrs. Crimp for $25,200 has been uniformly ignored.

Upon the confirmation of Master Booth's report and as a part of the order of confirmation, the cause was again referred to E. B. Sherman to take evidence and report respecting the claims against the Construction Company. The part of the order of confirmation making said reference reads as follows (Rec., 107):

"It is further ordered that this cause be referred back "to the said E. B. Sherman, master, to take further "proof, and report, with his findings thereon, within "thirty days from this date, on the claims so objected "to and not allowed, not including, however, the claim "of the complainant, except for moneys which may "have been advanced by said W. G. Crimp in his life-"time, over and above the sum of $25,200, hereinbefore "referred to, and all questions concerning the disposition "of any surplus which may remain after payment of the "general creditors are reserved until the coming in and "consideration of said report."

The record shows that on May 1, 1894, the master presented and filed two reports. The second one in order (Rec., 127–130) is here unimportant, since it mainly relates to a particular claim of the Northwestern National Bank. By the first report (Rec., 109–126) various claims are allowed as established against the McCormick Construction Company, and, amongst other things, the master finds (Rec., 125) that the claims secured un-

der the chattel mortgages amount to $16,510.06. He also finds (Rec., 110) that Crimp in his life-time advanced to the McCormick Construction Company the sum of $28,183.34, and deducting therefrom the sum of $25,200, he allows to Eugenia Crimp, executrix, $2,983.34, as a valid claim against the Construction Company. On another and distinct account he also allows to Mrs. Crimp, as executrix, the further sum of $740, making in all $3,723.34.

On May 15, 1894, the receiver filed his report (Rec., 105–6) showing receipts from sale of drainage contract and personal property, $41,000; from the drainage board, $9,640.62, and money in unclaimed pay envelopes, $86.29; total, $50,726.91, and disbursements, mainly under order of the court, of $11,548.62, and leaving in his hands $39,178.29, with a claim against it for receiver's services of $2,500, and for further allowance for solicitors' fees of $1,200.

On May 3, 1894, exceptions to the master's report were filed on behalf of Mrs. Crimp (Rec., 133), the causes of exception assigned being the refusal of the master to allow the whole amount advanced by Crimp to the Construction Company, viz: $28,183.13, and also the failure and refusal of the master to allow the sum of $2,983.13 as a preferred claim to be first paid out of the proceeds of the sale of the drainage contract. These exceptions were overruled in the final decree entered in the cause on the 15th day of May 1894 (Rec., 137 to 142). The decree found that the fund in the receiver's hands amounted to $39,178.29, of which $8,000 was the proceeds of the sale of certain personal property covered by mortgage and other liens. It allowed to the receiver his claim for services $2,500; to his solicitor as further com-

pensation $700, and to Sherman, master, for his fees and services $750, leaving a balance for distribution of $35,228.29. The schedule attached to the decree and made a part of it indicates how the distribution is to be made. It first distributes the proceeds of the sale of the personal property to the creditors holding the liens thereon, and the balance to the general creditors, the lien creditors coming in for their share as to that part of their claims not paid out of the proceeds of the personal property. In this distribution the claim of Mrs. Crimp for $25,200 is entirely ignored.

Upon the entry of this decree counsel for Mrs. Crimp presented to the court her petition for an appeal to the Circuit Court of Appeals, together with an assignment of errors, which was allowed and perfected. The case was heard in the Court of Appeals early in the October term, 1895. On January 6, 1896, the opinion of the Court of Appeals was filed and judgment entered affirming the rulings and decrees of the Circuit Court. A petition for rehearing presented by Mrs. Crimp was denied, and an additional opinion filed by the court. Both opinions are set out in the transcript of the record accompanying the present application and will be hereafter considered.

### Argument for Petitioner.

The principal question which the case presents is, what the proper construction of the agreement of July 24, 1893, as between Eugenia Crimp, executrix of W. G. Crimp, deceased (hereafter called appellant), and the McCormick Construction Company and R. P. McCormick (hereafter called appellees) for although the general creditors of the Construction Company by intervention or

otherwise claim the fund in court adversely to the complainant, still these claims are made under and through the Construction Company, and therefore are only such as the Construction Company itself could enforce in its own behalf. As to the fund now in controversy the case stands legally and equitably precisely as it would have stood if the contest were between the complainant and the McCormick Construction Company, either alone or in connection with R. P. McCormick.

It will also be observed that no evidence was introduced on either side tending to explain the conditions, facts and circumstances surrounding the execution of the agreement, and to assist the court in its construction. This may have been an oversight of counsel, but in this connection it must be remembered that Mr. Crimp was dead and could not speak, and the situation of the complainant as shown in the original bill and answer was not such as to justify her in making R. P. McCormick a witness in her behalf. Hence it is, that the agreement itself furnishes the only means of determining its construction and arriving at the intention of the parties.

Even a casual reading of the agreement is sufficient to show that it is *construction* and not mere *interpretation* which must be resorted to in order to determine the force and effect to be given to it. It is a crude instrument, evidently drafted by some one unskilled in the technical use of language, and whose knowledge of the meaning of words was too limited to justify confidence in his capacity to give accurate expression to the intentions of the parties and their relations to each other. As an illustration of this, the words, "*paid*," "*invested*" and "*advanced*," are used and applied to the same sum of money (the $25,200 in controversy), and as expressive of

the same act of transferring it from one party to the other, and out of this confusion of words grows much of the confusion of the document itself. This confusion, and others of similar character, find no solution in the judgments and opinions of the courts below, nor does any attempt seem to have been made by those courts to harmonize the seemingly incongruous parts of the instrument upon recognized principles of construction applicable in such cases.

II.

Although the record contains no extraneous testimony tending to enlighten the court as to the facts and circumstances attending the execution of the agreement, still the agreement itself discloses conditions which ought not to be overlooked, amongst which the following may be enumerated:

*First.* William G. Crimp was a resident of the city of Chicago, and apparently a man of some ready money awaiting profitable employment.

*Second.* The McCormick Construction Company was a corporation of the State of Missouri, managed and principally owned by R. P. McCormick. It had in some way secured a contract from the Sanitary District of Chicago for the doing of certain specified work upon a section of the Drainage Channel which the District was about to construct from the city of Chicago to a point in Will county, about forty miles distant, and in July, 1893, with assets amounting to upwards of $70,000, found itself embarrassed for the want of money with which to pay a current indebtedness of about $27,000. These assets and liabilities are specified in a schedule

sworn to by R. P. McCormick, which is attached to and made a part of the agreement.

*Third.* Under these circumstances, McCormick entered upon the negotiations with Mr. Crimp, then a stranger to him, so far as the record shows, which resulted in the agreement of July 24, 1893.

*Fourth. That agreement relates solely to the work to be done under the contract which the Construction Company had obtained and was then prosecuting with the Sanitary District. It is limited in its scope to that, and to that alone. And, on the very face of it, it was to terminate, and the relations of the parties established by it were to end with the completion of that Drainage contract.*

*Fifth.* The $25,200 which Crimp immediately paid out or *advanced* (I use the word *advanced* advisedly and as one of the words employed in the agreement in that connection), was advanced directly to the Construction Company, and was so intended, and was to be applied to the payment of the debts and liabilities of the company, shown in the schedule above referred to. (See Articles I. and VII. of the Agreement.) The simple fact of an advance of money for such a purpose imports an obligation to refund it.

*Sixth.* All the stock in the Construction Company which figures in the transaction, was the individual stock of R. P. McCormick, and however intimate the relations may have been between the company and McCormick, the two were distinct and separate individualities and should not be confounded.

*Seventh.* The Drainage contract was the property of the Construction Company, and not the property of R. P. McCormick.

*Eighth.* It is substantially, and, as I think, distinctly provided, in the 4th and 11th articles of the agreement, that the $25,200 paid in or advanced by Crimp shall be repaid to him.

The foregoing eight specifications or statements of fact appearing upon the face of the agreement, are the same in substance and almost identical in language, as those contained in the petition for rehearing, which are referred to, criticised and pushed aside, in the opinion of the Circuit Court of Appeals denying that petition. And when an examination of the two opinions of that court may safely be appealed to as proof of the fact that not one of these elements of the agreement was given a place amongst the facts to be considered in reaching a construction of the instrument, some foundation, at least, is laid for the assertion that, in its consideration of the case presented to it, that learned court departed widely from the acknowledged rules applicable to such cases, and adopted a method of its own, which is both inadmissible and misleading. A fact appearing upon, or as a reasonable inference from the instrument itself, is certainly as valuable an aid to the proper construction of that instrument as though it had been brought in by extrinsic evidence.

## III.

### OF THE PRINCIPLES OR CANONS OF CONSTRUCTION.

It is unnecessary in this court to dwell long upon the rules of construction. It is but the suggestion of common-sense, however, that if, when we walk in a labyrinth, a thread or a clew can be found stretched along the intricate passage-ways, leading to the open daylight,

it is well to grasp and follow it. There are some such threads or clews which run through the ill-arranged and badly-expressed agreement now under consideration, which the Court of Appeals seems not to have appreciated.

In 1 Addison on Contracts, 181, the author says: "The actual intention of the parties at the time of con- "tracting is the chief guide in the construction of con- "tracts, and if this can be ascertained and is lawful, it "must govern." (See also note 1, on same page, and cases cited.)

At page 184 of same volume, the author says: "But "if the ambigaity arises simply from an imperfect "expression of the meaning of the party and can be re- "solved by reference to the general context of the in- "strument, when brought in contact with the surround- "ing circumstances, the court will aid the imperfect "expression in favor of the manifest intention, and will "draw all such plain and reasonable inferences from the "language and general context of the deed, as appears "to be necessary to give effect to the obvious meaning "and to carry into execution any matter or act clearly "contemplated and intended to be done."

In *Goddard* v. *Foster*, 17 Wall., 123, this court says: "Courts of Justice are not denied the same light and "information the parties enjoyed when the contract "was executed, but they may acquaint themselves with "the persons and circumstances, that are the subjects "of the statements in the written agreements, and are "entitled to place themselves in the same situation as "the parties who made the contract, so as to view the "circumstances as they viewed them, and so to judge of

" the meaning of the words, and of the correct applica-
" tion of the language to the things described."

In *Waldron* v. *Willard*, 17 N. Y., 466, the court (page 468) says: " Courts are not required to confine " themselves to the exact signification of the terms found " in the contract, when it is plain from the situation " of the parties at the time it was made, *and the condi-* " *tion of the subject-matter* of the contract, that a literal " interpretation of the language of the parties would " fail to give effect to their intentions. It is upon this " principle, that extrinsic evidence is always allowable " to enable the court to place itself in the position occu- " pied by the parties themselves, when they contracted, " that thus it may the better discern their real inten- " tion."

In *Robinson* v. *Stow*, 39 Ill., 568, Mr. Justice Law-rence, speaking for the court, says: " While it is not " the province of courts to interpolate new terms into " contracts against the evident intention of the parties, " with the view of making such contract more reasona- " ble, yet on the other hand, even a strained construc- " tion of the language will be adopted *for the purpose* " *of preventing obvious injustice*. The intention of the " parties, it is true, must govern; but the experience of " human affairs teaches courts, that this intention is " not to be sought merely in the apparent meaning of " the language used, but this language may be enlarged " or limited by reference to the circumstances surround- " ing the parties and the object they evidently had in " view. It often happens, that a particular clause in an " instrument is made to bear a meaning quite inconsist- " ent with the natural import of the terms used *by ref-* " *erence to the entire language and scope* of the contract.

"'The judges,' says Lord Hale, 'ought to be curious "and subtle to invent reasons and means to make acts "effectual according to the just intent of the parties: "they will not, therefore, cavil about the propriety of "words, when the intent of the parties appears; but "will rather apply the words to fulfill the intent, rather "than destroy the intent by reason of the insufficiency "of the words.' Broom's Maxims 416, margin page," etc.

These references are thought to be sufficient to outline the general rules, which control in the construction of written instruments in cases like the present one.

## IV.

### OF THE AGREEMENT AND THE CONSTRUCTION TO BE GIVEN TO IT UNDER THE RULES APPLIED IN SUCH CASES.

There are two ideas or purposes stated with exceptional clearness, which run through the whole operative part of the agreement of July 24, 1893.

1st. That the parties *were not dealing or intending to deal* in respect to the acquisition by Mr. Crimp of a permanent interest in the McCormick Construction Company, but only in respect to an interest in the drainage contract held by the Construction Company. With the operations of that company outside of the drainage contract, Mr. Crimp, under the agreement, could neither have nor rightfully claim any interest.

2d. *A right of redemption is clearly reserved to the Construction Company and McCormick, in respect to all the assets and property, placed by them in the possession of Mr. Crimp.*

It would seem to be reasonable to expect that these unequivocal provisions of the agreement should have some influence, and I think I may venture to say, a controlling influence in determining the intention of the parties, which is the principal purpose of construction.

A single illustration under the first specification may be admissible.

There are four paragraphs in the preamble of the agreement. The *first* recites the organization of the McCormick Construction Company and its ownership of the contract with the Sanitary District of Chicago, stating briefly the work to be done under that contract. The *second* indicates what the Construction Company has done and is doing in pursuance of that contract under the direction and superintendence of R. P. McCormick, its president and general manager. The *third* simply recites that R. P. McCormick is the owner of 225 shares of the Construction Company's stock. The *fourth* reads as follows: "Whereas, W. G. Crimp, of 4445 Champlain "avenue, Chicago, is desirous of becoming *interested in* "*the said McCormick Construction Company*, on the "terms, conditions and stipulations as hereinafter pro- "vided."

Construing this fourth paragraph, as the rule authorizes, by and in connection with what precedes and follows it, and keeping in mind that the body of the agreement limits the interest of Crimp to operations under the drainage contract, it is submitted that this paragraph of the preamble signifies simply that Crimp was desirous of becoming interested in the contract which the Construction Company had with the Sanitary District, and that the literal meaning of the language made

use of in that paragraph, does not express the intention of the parties, and that in order that it may be made to express that intention it should read substantially as follows:

"Whereas, W. G. Crimp * * * is desirous of "becoming interested in the drainage contract of the "McCormick Construction Company on the terms, con- "ditions, etc., hereinafter provided."

If this is a right conclusion (and reasonable contradiction of it is challenged) it may be positively affirmed that it was not within the intention or purpose of the parties at the time the agreement was executed, that Mr. Crimp should become an actual purchaser of any stock in the Construction Company, or in the language of the master who first started the contrary theory, "that W. "G. Crimp should become, and that he did become *in* "*the full sense* a stockholder" in said company, and yet this theory, thus started (Rec., 101), runs through all the orders, opinions and judgments heretofore made, given and rendered in the progress of this case, in evident disregard of the intention of the parties and to the perversion of the real meaning of the agreement into which they entered.

Now let us see what can be said in support of the second specification, viz: that the agreement provides for a redemption of all the assets and property which came to the possession of Crimp under the agreement.

Article 1 reads as follows: "That in consideration of "the sum of twenty-five thousand two hundred dollars "($25,200) cash, *paid to said McCormick Construction* "*Company* by said second party (Crimp) there shall be "at once assigned and issued to said second party one "hundred and twenty-six (126) shares of the capital

" stock of the said McCormick Construction Company,
" *now owned by R. P. McCormick*, the par value there-
" of being two hundred dollars ($200) per share, full
" paid and non-assessable."

I give this article in full for the purpose of calling attention to the words which are *italicized*, and especially the words *paid to*. In Article IV, the same sum of $25,-200 is mentioned as "*invested in the stock of said com-*
" *pany*," and it is also spoken of in the same article as
" *money advanced*." In Article V, it is mentioned again as "*paid by said second party to said Construction Com-*
" *pany under this agreement*." In Article VII it is referred to as $25,200 "*to be now advanced by said sec-*
" *ond party*," and in Article XI the same sum is described as "*the amount originally advanced hereunder*." The question is, which of these descriptive phrases best accords with the intention of the parties when considered in connection with the actual conditions and the entire scope of the agreement? This inquiry, however, must be deferred for the present.

Article II of the agreement simply provides that Crimp shall be elected a director and vice-president of the company, and shall personally assist in the management of its business *without salary*, and shall be entitled to have a representation in the office at an expense not to exceed $100 per month.

Article III provides that the personal expenses or outlays of the officers of the company *shall be charged* to such officers personally. That the officers shall receive no salary, and that McCormick "shall devote his entire
" time to and manage and personally direct the con-
" struction of said drainage channel during the life of
" said contract" without charge other than his share of the profits as a stockholder.

Article IV reads as follows: "That said second party "shall be entitled to fifty per cent. of the net profit *ac-* "*cruing to and to be divided by said Construction Com-* "*pany on account of said work now being done or to be* "*done under its contract with said Sanitary District*, and "the first party hereto hereby agrees and guarantees "that the amount of such profit to become due and pay- "able to said second party shall not be less than twen- "ty-five thousand dollars ($25,000), not including the "sum of twenty-five thousand two hundred dollars "($25,200) invested in the stock of said company under "this agreement, *which said latter sum shall be returned* "*to said second party*, prior to and before any division "and distribution of the profits arising to said Construc- "tion Company under said construction agreement, shall "be made. On receipt by said second party of which "share of the profit *and the money advanced* and to be "advanced by second party, second party shall recon- "vey to said McCormick two hundred and twenty-five "(225) shares of the capital stock of said Construction "Company herein mentioned."

Here is a provision which must be construed to be an absolute promise and undertaking to refund to Mr. Crimp the said $25,200. But by whom is the money to be repaid? Naturally and evidently by the party that received it, or to whom it was paid over or advanced, viz: the McCormick Construction Company. This of itself not only means, that it was not the intention of the parties, that Crimp should make or was making an investment in the stock of the Construction Company, or as the master put it, "become to the full extent a stock- "holder," but also, of itself and independently of what follows in the same article, that the stock which

was transferred to Crimp by McCormick, and issued in his name, should be subject to redemption by the payment to him of the moneys mentioned in that connection. But when was the $25,200 to be returned? The agreement says, "*before any division and distribu-*" *tion of the profits arising to said Construction Company* " *under said Construction Contract*," which must mean the Drainage Contract. But the drainage contract was abondoned by the Construction Company, before the original bill in this case was filed. So the bill alleges, and so the answer of the Construction Company and McCormick admits. Of course, under such circumstances, no profits were earned or received for distribution. Is the obligation to refund the $25,200 to Mr. Crimp thereby released? Certainly not, and for the good reason that the obligation to refund is in no sense made dependent upon the realization of profits. The agreement says, the money shall be returned before profits are divided, and when it is made to appear that there never will be any profits to be divided, the obligation to refund the money must mature at once. There can be no other result following the conceded premises. The $25,200 was therefore due from the Construction Company to the appellant as the representative of Mr. Crimp, when the original bill was filed, and it is probably true, although it may not be important, that McCormick as a consequence of his connection in the agreement with the Construction Company (the two constituting the party of the first part) would be liable as surety for the return of the money.

But the last clause of Article IV is, perhaps, more explicit upon the question of redemption. This expressly provides that upon the receipt of his share of the profit

and *the money advanced and to be advanced by him*, Mr. Crimp shall reconvey to McCormick "*225 shares* of the capital stock of said Construction Company herein mentioned." How it comes to be 225 shares instead of 126 is shown in Article V, which will be presently considered. It is probable that in this clause and as a deduction from the use of the word "*reconvey*," that the Circuit of Appeals found its justification, or rather its apology, for denominating the transaction between the parties as to the stock "*a conditional sale*," that is a sale by McCormick to Crimp upon the understanding that McCormick should repurchase the same stock at the same price. The opinion, however, does not make any special reference to this clause as furnishing support for such a conclusion, and, if it had, the conclusion would have been equally open to adverse criticism, for the word "*reconvey*," as used in this connection, is simply expressive of the process which it would be necessary to go through with upon a redemption of the stock, in order to reinvest McCormick with the legal title to the 126 shares, which was, by the terms of the agreement, to stand in the name of Crimp on the books of the company, and certificates therefor to be issued in his name. A transfer or reconveyance of those certificates would, therefore, be necessary to place the title in McCormick, and this was all the word "*reconvey*" was intended to express. In this respect the case is not different from the very common one, when an absolute deed is made to land as security for a loan or advance of money. A payment of the money does not revest the legal title. A release, quit-claim, or reconveyance is necessary for that purpose.

In further support of the proposition, that all the

assets and property which, under the agreement of July 24, 1893, came into the possession of Crimp, came there subject to a right of redemption. I call attention to Article XI, the last but one of the instrument, passing over, for the present, all the intermediate articles. It reads as follows:

"That on the completion of the work provided for in "said contract" (and by the word *contract* here is undoubtedly meant the drainage contract), "and the receipt of "(by?) said Construction Company of payment for the "same, and in case of the faithful performance "of this agreement and of all undertakings hereunder "*by the first party hereto, and the repayment to said* "*second party of the sum of twenty-five thousand, two* "*hundred dollars ($25,200), the amount originally ad-*"*vanced hereunder*, and the additional sum of one-half "the profits, but not less than twenty-five thousand "dollars ($25,000) as provided in said guaranty, and of "the said sum of seven thousand dollars ($7,000) and "interest as herein provided, *then* there shall be re-"assigned and returned to R. P. McCormick all of the "shares of stock of said Construction Company, herein-"before provided to be issued to said second party and "held by second party in his own name, or held by him "as collateral, and said contract" (drainage contract) "shall in such case be returned to said company, and "*thereupon this contract shall be ended.*"

Here is, as it seems to me, most clear and convincing confirmation of the fact, not only that the interest of Crimp in the McCormick Construction Company was strictly limited to operations under the drainage contract, and therefore that he was not to become an actual stockholder in the Construction Company, but also that all

the assets and property which he received into his possession under the agreement, including the drainage contract, which he acquired possession of under Article VI of the agreement, were held by him as a pledge and subject to redemption upon terms specifically stated and understood, and that this must have been the intention of all the parties. Could such language have been used by intelligent men, if it had been the intention that Crimp should become the real and absolute owner of the 126 shares of stock? The fact that the shares stood or were to stand in his name on the books of the company and that he was to be made a director and vice-president, are unimportant in this connection. The provisions in that behalf were for his better protection, and to enable him to have some direct influence in the management of the corporation—an advantage, however, which was wholly defeated by his unexpected sickness and death. The contention now is that Articles IV and XI clearly import that Mr. Crimp was to have only a limited and defeasible interest in the Construction Company and that whatever he received from the company or McCormick was to be held by him solely as a pledge or security.

Articles V and VI of the agreement in form and expression, are certainly subject to criticism. They are, however, by the application of the rules of construction above adverted to not irreconcilable with that theory of the intention of the parties now contended for and in some respects are strongly corroborative of that theory. They read as follows:

"*Fifth*. That *as security* for the guaranty of said "twenty-five thousand dollars ($25,000) profit, in addi- "tion to the principal sum of twenty-five thousand two

"hundred dollars ($25,200), paid by said second party "to said Construction Company under this agreement, "there shall be delivered and assigned to said second "party, ninety-nine shares of the stock of said Con- "struction Company of the par value of nineteen thou- "sand eight hundred dollars ($19,800), owned by "said R. P. McCormick, which shall be held as collate- "ral to this undertaking, and as security for the guar- "anty of profits herein made by the first party.

"*Sixth*. That there shall also be delivered, but not "assigned to said second party, the original contract "existing between the said Construction Company and "the Sanitary District of Chicago, to be held by said "second party in connection with the stock of said Con- "struction Company hereby agreed to be transferred "and issued to said Crimp for the guaranty herein "made, and as security for any sums or sum other "than above mentioned, that he may advance to said "Construction Company; it being intended that said "Crimp through his ownership and control of all said "stock hereby provided to be transferred to him, shall "control the said contract in the event of the failure "by first party to carry out this contract or breach of "this contract by the first party, and it is further "agreed, that said contract shall not, nor shall any "right, title or interest therein, be at any time as- "signed by any of the persons signing this contract, the "said contract always to remain the property of said "Construction Company, subject to the rights of said "second party hereunder."

The reading of these articles reminds me of the advice an old attorney, somewhat prolix in his use of language, is said to have given to a student in his office, to

the effect, that if in drafting a paper he did not at first succeed in expressing himself to his satisfaction, he should not go back and correct what was written, but keep straight on until he fully explained what he intended. This would be drafting an instrument with a glossary—and something of this is apparent here.

The *fifth* article is of but little importance now; for the abandonment of the drainage contract put an end to profits to be derived therefrom, as well as to the value of the Construction Company's stock, and the petition avers, and it has never been otherwise pretended, that both the company and McCormick are wholly insolvent and irresponsible. But, however much these conditions may affect the remedies, they do not abrogate the covenants and obligations of the parties themselves. The latter remain, even though the ordinary means of enforcing them may be wholly unavailing. The appellant is not here pressing for profits, as such, which were not realized, but simply for the payment of the principal of the advances made by Mr. Crimp in his lifetime to the McCormick Construction Company, which both McCormick and the company agreed should be refunded, and is seeking to secure this by virtue of a lien upon the drainage contract and the proceeds thereof, created in her favor by the general tenor and effect of the agreement under consideration and the specific provisions of article VI, when rightly construed.

The impression which follows the reading of article V is of an intention on the part of the Construction Company and McCormick to furnish security for the guaranty of profits, and this impression is strengthened by the general scope of the agreement. The reference which it contains to the original advance of $25,200 was intended

simply to distinguish and separate the latter from the former, and not to confuse or confound the two. It would be quite absurd to pledge stock of the nominal value of $19,800, and possibly of no intrinsic value at the time, as security for $25,000 of profits, *and* the original advance of $25,200, for which latter sum Crimp already held 126 shares of the same stock of the par value of $25,200. Each share of this stock would, of course, be equal in value with every other, and if they had proved to be worth par, Crimp's advance of $25,200 would have been fully paid by the 126 shares, whilst the ninety-nine shares would have paid only about two-thirds of the guaranteed profits of $25,000. Under no circumstances, assuming the agreement had been fully performed, could anything have come out of the ninety-nine shares to be applied to the payment of the original advance of money. The reference to the $25,200 in this article may be stricken out, or wholly disregarded as surplusage, and then the words, "this undertaking" have direct reference to the guaranty of profits, and in the concluding clause, "*and as security for the guaranty of profits herein made by the first party*," the scrivener has at length reached the culmination of his purpose, and given expression to the intention of the parties. This brings the article into harmony with the reasonable intention clearly manifested in other parts of the agreement.

The same trimming process should be applied to Article VI. The effect of this article is a deposit of the drainage contract with Crimp and the purpose of that deposit, which was in fact made, is clearly stated in the concluding clause, viz.: "The said contract always to remain the property of said Construction Company, *sub-*

*ject to the rights of said second party hereunder.*" The body of the article also says: "It being intended that said Crimp * * * *shall control the said contract in the event of failure by first party to carry out the contract, or breach of this contract by the first party.*" These statements make it clear that the object of the deposit of the drainage contract with Mr. Crimp was indemnity and protection to the rights of Mr. Crimp and the giving of a pledge or security for the faithful performance of the agreement on the part of the Construction Company and McCormick. In other words, the drainage contract, by virtue of the deposit, became a general collateral for the undertakings of the Construction Company and McCormick, and, so far as it might be sufficient, a pledge or security for the protection of the rights of Mr. Crimp. The reason for the provision against the assignment of that contract is found in the statement of the case in the first opinion of the Circuit court of Appeals (Rec., 196), where it is said: "That it was admitted * * * "that the drainage contract referred to in the foregoing "contract contained a provision, which prohibited the "original contractor from assigning it or sub-letting "the work under penalty of forfeiture."

Did Mr. Crimp have any rights under the agreement of July 24, 1893, to be protected, and did the Construction Company and McCormick fail to carry out their agreement, or commit any breaches thereof on their part? Certainly Mr. Crimp had such rights, and some of them may be readily pointed out. He had a right to the repayment of the money he advanced; he had a right to have the drainage contract fully executed, and to receive the guaranteed profits resulting from such execution. These are enough rights for present purposes.

As to the failures and breaches on the part of the Construction Company and McCormick, it is sufficient to say that they failed in every respect. During the illness of Mr. Crimp they abandoned the performance of the drainage contract, thus destroying all chances of realizing profits therefrom, and utterly failed to refund the money which Mr. Crimp had advanced to enable the company to pay its debts and go on with the work. In addition to this, they diverted and misapplied a very large part of the advances made by Mr. Crimp, and by their conduct destroyed the value of the stock which was transferred to Mr. Crimp, by way of partial security and for his protection, thus leaving in his hands nothing of value except the drainage contract itself.

Was the transaction as recited in Article VI sufficient to create a pledge of the drainage contract? The opinion of the Circuit Court of Appeals answers this question in the negative, and in this it is insisted that court committed an error. It is not urged as a reason for this decision of the court that the drainage contract was not actually assigned to Mr. Crimp; nor could it be. Such an assignment is not necessary to the creation of a pledge. If A borrows $1,000 of B, and deposits with B as collateral security the note of C payable to the order of A without endorsement, the note of C is effectively pledged as security for payment of the borrowed money. The note and its proceeds are impounded for that purpose. The status of the note is exactly that which Article VI states to be the status of the drainage contract in the hands of Mr. Crimp, viz.: "*The property of said Construction Company subject to the rights of said second party.*" That is the condition of every pledge—the property of the pledgor, subject to the

rights of the pledgee. No general words can better express or more accurately define an intention to make a pledge, or create a lien. Before the introduction of registration laws, mortgages upon lands as security for money loaned, were effected by a simple deposit of the title papers with the lender, and registration laws do not, in this country, certainly not in the State of Illinois, apply to pledges of personal assets when actual delivery of possession accompanies the written or other evidence of the pledge.

Article VII provides "that the said sum of twenty-"five thousand two hundred dollars ($25,200), *to be* "*now advanced* by said second *party*, shall be used by "the first party in the payment and liquidation of the "debts and liabilities of the McCormick Construction "Company, *as set out in the sworn schedule of assets* "*and liabilities hereto attached and made a part hereof*, "except as herein otherwise provided."

With this provision the Construction Company and McCormick did not comply. This is partially shown by a comparison of the names of the creditors contained in the schedule (Rec., 94) with names of the creditors whose claims are allowed in the final decree of the Circuit court (Rec., 139–142). The names of the principal creditors and the amounts of their respective claims are practically the same in both lists. But more direct proof is found in the answer of the defendants to the original bill, in which (Rec., 23) it is admitted that $10,-350 (on page 25 the amount is stated as nearly $11,600) of the money advanced by Crimp was used in paying off an indebtedness of McCormick to one George H. Frost, for money borrowed by McCormick for the account and benefit of the Construction Company, and at page 26 in

the same answer, it is admitted, that on November 11, 1893, only two or three days before Crimp's death, McCormick drew from the bank moneys of the Construction Company to the amount of $7,400, (as is said for the purpose of paying laborers' wages) of which he was robbed as is claimed, on the evening of the 14th of November, whilst in an unconscious state occasioned by poisonous drugs, administered to him by some unknown person. The admission that these two sums of money were thus misapplied, is full and complete. What credence should be given to the excuse, that Crimp agreed to the diversion of the larger sum, and that McCormick drew the smaller sum for the purpose of paying the workmen on the canal, and after carrying it in his pocket for three days, was robbed of it in the manner stated, each one who reads the statements, must determine for himself. No attempt was made to sustain these statements by evidence, and in themselves they are suggestive of dishonesty if not of criminality—one thing, however, the admitted diversion of the larger sum does show, even if the excuse is accepted along with the admission, and that is, that in swearing that the statement or schedule of assets and liabilities, attached to the agreement included "all the assets and liabilities" of the Construction Company, McCormick was guilty of fraudulent misrepresentation and moral perjury—for that schedule makes no mention of any debt owing by the Construction Company to him, which would be a fact well known to him, if his excuse is true.

Article VIII provides that Crimp "shall *advance* to "said Construction Company, the further sum" of $7,000 for the purpose of taking up the debt of the company to the Northwestern National Bank, shown in the

schedule, and that as that indebtedness is paid by Crimp, he shall be entitled to the notes of the Construction Company for equal amounts bearing interest at seven per cent. The language of this article seems to be well chosen and explicit in its meaning. It therefore requires no comment.

Article IX provides: "That the ninety-nine (99) shares "of stock in said Construction Company to be assigned "to said second party, under paragraph *fifth* hereof, "*and said contract mentioned in paragraph six hereof*, "shall also stand and be held by said party in like man- "ner as security for the payment of the promissory notes "of said Construction Company, covering the advance "of the seven thousand dollars ($7,000) aforesaid."

The record shows (page 110) that Crimp advanced to the Construction Company about $3,000 in excess of the sum of $25,200, quite sufficient to pay all the debts of the company shown in the schedule of assets and liabilities sworn to by McCormick; but it does not appear that his advances over and above the $25,200 were sufficient to pay the indebtedness to the Northwestern National Bank, or that he ever received any note or notes of the Construction Company, as provided in Article VIII. Nor does the record disclose what was done with this additional advance of $3,000. Mr. Crimp's serious illness may reasonably account for any delinquency on his part, if any such there was. He could not personally act or superintend the action of others. The whole business was in the control of the Construction Company, of which McCormick was the president and general manager. Article IX clearly shows that the Drainage contract was to be held by Mr. Crimp *as security* under preceding articles of the agreement, and by that article

that security is extended so as to include the amounts advanced by him towards the payment of the indebtedness to the bank. The article, therefore, is entirely in harmony with the position, that the Drainage contract was pledged to Crimp for his protection and indemnity against the acts and default of the Construction Company and McCormick.

Article X reads as follows: "That in case of the fail- " of the first party to carry out and faithfully perform all " the agreements and undertakings hereunder, that the " said ninety-nine (99) shares of stock of said Construc- " tion Company mentioned in paragraph fifth hereof, im- " mediately upon such failure become the property of " said second party as and for liquidated damages here- " under."

This article read by itself and interpreted according to the literal meaning of the words used is undoubtedly embarrassing, and apparently it became the stumbling block in the pathway of the Court of Appeals, which that court could not surmount, get around or push aside, and which obstructed not only its progress in a straight line, but also shut out from its view all the other provissions of the agreement, and was adopted as the touchstone, by which to determine the rights and relations of the parties. In doing this, the court manifestly disregarded all rules applicable to the construction of written instruments to which reference has already been made. It forgot that "it often happens that a particular clause " in an instrument is made to bear a meaning quite in- " consistent with the natural import of the terms used " by reference to the entire language and general scope " of the contract." And that according to Lord Hale. " The judges ought to be curious and subtle to invent

"reasons and means to make acts effectual, according "to the just intent of the parties." The Court of Appeals also overlooked another principle which, if it cannot be read in exact words from a book, ought not for that reason to be less respected, viz.: that when a clause or section of an instrument can be construed or applied in two ways, that way is to be preferred and adopted which harmonizes the whole instrument and all its parts and makes it consistent with a reasonable purpose and intention, and the possession and exercise by the parties of some degree of business intelligence. The opinion of the Court of Appeals intimates at least, that the 10th article of the agreement concludes all other remedies which Crimp or his representative might otherwise have for breaches of the agreement on the part of the Construction Company and McCormick. Let us see what that means. It means, if it means anything, that if McCormick, as the president and manager of the Construction Company, had, the next day after Crimp had paid in his money and got possession of the stock certificates and the drainage contract, abandoned the performers of the drainage contract and appropriated to his own use all the money advanced by Crimp (and this he practically did, although not quite so early perhaps) then all Crimp would have or could keep would be the 99 shares of stock, made worthless by McCormick's dishonesty and bad faith, and upon the application of the Construction Company, Crimp would be compelled to hand over the drainage contract and for the same reason, upon the application of McCormick, the 126 shares of stock, which had been issued in his name. Was such a possibility within the reasonable intention of the parties? Another form of inquiry is more appropriate, viz.: Is it necessary

that article X shall have a construction, which will admit of such consequences? The Court of Appeals in part repudiated such a construction when it affirmed the decree of the Circuit court allowing Mrs. Crimp to share with other creditors to the extent of Crimp's advances over and above the sum of $25,200. It should have repudiated it entirely, for such a construction is not only unnecessary, but it casts upon Mr. Crimp the imputation of a business imbecile, and makes of the agreement which he signed, a business fraud. Such a construction renders the agreement inconsistent with ordinary business intelligence on the part of Mr. Crimp, and ordinary business honesty on the part of McCormick and his company. Such conditions and intentions ought not to be assumed, nor ought they to follow as a just conclusion from a fair construction of the business arrangement here presented.

In all honest efforts to reach the intention of the parties, as sensible men, in the adoption of Article X of the agreement, not only the general scope of the agreement should be kept in mind, but also the fact, that by Article V the ninety-nine shares of stock are primarily pledged as security for the guaranty of profits to the amount of $25,000, and nothing else. Article V is referred to in Article X. It must also be borne in mind, that under the rules of construction applicable in such cases, the courts are not obliged to give to the words employed, their natural and technical meaning, certainly not when other meanings may be more appropriate and available for reaching the reasonable intention of the parties atd more in harmony with the general scope of the whole instrument. There are numerous cases in the books, where the courts have construed the

words "*liquidated damages*" or "damages" to mean a penalty, and not a sum actually payable, and where the words "penalty" or "forfeiture" used in an agreement to pay money have been construed to signify "*liquidated damages*." The context and the supposed reasonable intendment of the parties control the meaning of the words in such cases. It is common practice in the courts to distinguish the principal sum from the interest or profits resulting from its investment or use. Under certain conditions the one is called the debt, the other the damages. Can it be fairly inferred from the whole agreement, and the circumstances of the parties as disclosed by it, that it was the intention of the parties, or either of them, that in case the Construction Company and McCormick, or either of them, failed in the performance of their part of the agreement, the ninety-nine shares of stock of the par value of only $19,800 should be accepted by Crimp in full satisfaction for all his advances of about $28,000 in addition to his loss of $25,000 of guaranteed profits, and that thereupon all that he had received by way of security, except the ninety-nine shares, should be released of any lien thereon in his behalf, and he be left without remedy or redress of any kind? Such an intention cannot be ascribed to Mr. Crimp. If in the light of their conduct subsequent to the execution of the agreement such an intention can be justly fastened upon the other parties, then, as to them and all persons claiming through them, the whole agreement was a fraud upon Mr. Crimp, and the court will give him the full benefit of all the securities which came into his hands for his protection and indemnity. In such a case the court will, as far as possible, seek to restore the par-

ties to their original positions, but it will not compel Mr. Crimp to surrender the securities he held, without the return of the money he advanced; but will rather, in case the money is not repaid, direct the securities to be converted into money to be applied to such repayment. Under no circumstances, would or could the court adopt the course intimated in the opinion of the Court of Appeals. That court in its second opinion said in substance, that if the agreement was set aside for fraud, the appellant would have no remedy whatever as against the stock and drainage contract, and for the reason, that all her possible rights and claims in that regard were dependent upon the integrity of that agreement. This is a mistake. The lien upon the stock and contract would remain, though the special agreement were set aside, and to place the parties *in statu quo*, the court would order the return of the money advanced, to Mr. Crimp, and the return of the stock and contract to the other party; but it would not compel the surrender of the securities without the return of the advances, and if the advances were not otherwise provided for the securities would be sold and the proceeds applied, not as has been here done, to the payment of the general creditors, but primarily for the payment of the advances made by Crimp, the surplus only to be distributed to general creditors. The court of Appeals for some reason, seems to have considered its positions but indifferently well upon any branch of this case. The opinions furnish evidence of the fact that it preferred to trust itself upon an old and unsafe trail rather than to adopt a new and secure pathway.

Another suggestion in this connection. It is not to be supposed that Mr. Crimp's illness and death, so soon

after the signing of the agreement, although a possibility, was within the contemplation of the parties at the time, and if all parties were acting honestly the possibility of an abandonment of the drainage contract could hardly have been anticipated or considered. In construing a contract to the literal performance of which obstacles had arisen subsequent to its execution, this court, in the case of *Chicago, Milwaukee, &c. Railway* v. *Hoyt*, 149 U. S., 1–15, says: "But when the event "is of such a character that it cannot be reasonably "supposed to have been in the contemplation of the "contracting parties when the contract was made, they "will not be held bound by general words which, "though large enough to include, were not used with "reference to the particular contingency which after-"wards happens."

Mr. Crimp's fatal illness and death threw the entire management of the business of the Construction Company back into the hands of McCormick. By the agreement, Crimp had the right to "*personally* assist in operating "and managing said company and its business and "affairs" (Article 2) and to furnish a suitable representative in the office of said company." This "representative" was to be simply an office employe, and was not, nor was he intended to be a substitute for Mr. Crimp in the management of the business of the company. McCormick was to "devote "his entire time to and manage and personally direct "the construction of said drainage channel." (Art. 3.) It was not contemplated that McCormick should draw the funds of the company from the bank and apply them to the payment of his own indebtedness or carry them about his person, subject to such risks as are attendant

upon bad habits and bad associations. Nor was it understood that the drainage contract could be abandoned—certainly not without the consent of Mr. Crimp himself. These were not the contingencies in the minds of the parties when Article X was adopted or allowed to stand as a part of the general agreement, and it, therefore, follows, under the rule announced by this court in the case above cited, that under the new and unanticipated conditions, Mr. Crimp and his representative should not be "bound by the general words," which were not intended to apply to such conditions. The agreement itself made no provision for such happenings. True, defaults and failures on the part of the construction company and McCormick were referred to and sought to be guarded against, but these may well be limited, under the rule, to contingencies less serious than a total abandonment of the enterprise and a willful or fraudulent diversion of the company's funds, and that they should be so limited, we have the express authority of this court in addition to the general rules or canons of construction which are here applicable. Indeed, it may well be claimed that in such a case the party guilty of a total disregard of all his obligations under the agreement, should not be permitted to shield himself behind any of the provisions of the instrument, of which he might otherwise claim the benefit. No man is allowed to take advantage of his own wrong. The appellant claims nothing under the provisions of Article X. The appellees and general creditors claiming through the construction company, are not in a position to force upon her the consequences of those provisions against her protests and to her disadvantage.

But, again, it is insisted that if Article X has any

vitality, which, under the circumstances, can be availed of by the appellees, it should be strictly limited in its application to the special subject to which it refers, viz: the profits, or rather the guaranty of profits, for the payment of which the said 99 shares of stock became a pledge or security. Such a limitation is justified by the rules of construction and is required for the purposes of justice.

Attention has already been called to Article XI of the agreement. It binds together all the articles preceding it, and clearly defines the relations of the parties to each other and to the subject-matter. It shows conclusively that it was not the intention of the parties that Crimp should become a stockholder in fact in the McCormick Construction Company, and that all the stock transferred to him was simply held by him for a special purpose and subject to redemption. It also shows that the drainage contract was held by him as a pledge for the repayment of the moneys advanced by him to the Construction Company, and the complete performance of the agreement on the part of the company and McCormick. It also clearly states that the relations of the parties were to end with the completion or termination of the drainage contract, and yet this article is not referred to in the original opinion of the Court of Appeals, and attention having been called to this omission in the petition for rehearing, the second opinion, apparently written for the purpose of firing a parting shot at the writer of the petition, disposes of the article by saying, that it had been considered along with other provisions of the agreement. All that can be said in reply to this is, that the opinion itself gives no testimony in support of the statement.

Article XII, which concludes the agreement, gives positive support to the construction of the agreement now contended for. It reads as follows:

"That at the completion, termination and fulfillment "of this agreement in all its terms and conditions, all "the shares of stock above mentioned, *either held by said "second party in his own name*, or AS SECURITY FOR SAID "GUARANTY, shall be transferred to said McCormick, but "all of the increment and betterment of the assets of "said company and all additions thereto made subse- "quent to the date of this agreement shall be the joint "and equal property of the parties hereto, to be dis- "posed of as they may agree."

The philosophy of the position of the Circuit Court of Appeals in respect to this article has constantly eluded the writer's comprehension. It is either too high or too low to be readily reached or understood. There seems to be no ambiguity or mystery in the perspective opened up by it, and the language employed does not appear to be used for the purpose of concealing ideas. It is direct and common-place in all its parts. The first clause is merely a repetition of the general idea which runs through the whole agreement—the same idea now and at all times contended for on behalf of appellant, viz.: that Crimp simply held the stock of the Construction Company as security and subject to redemption upon the completion or termination of the agreement, and the second clause simply provides how the additions to the plant of the Construction Company shall be held and disposed of when the business relations of the parties shall have come to an end. In both branches of it, it shows that it was the intention of the parties that the relations of Crimp to the Construction Company and McCormick

should be temporary, and for the purpose of carrying out the drainage contract only. The provision in respect to the betterments and additions to the plant of the Construction Company follows naturally from the understanding that Crimp should have one-half of the net profits resulting from the completion of the contract with the Sanitary District; for it would seem to be clear that whatever was invested in the betterment of or addition to the working plant of the Construction Company, would to that extent diminish the cash in hand to be divided as profits, and in order to avoid a dismemberment of the plant, so far as it had been improved or enlarged during the life-time of the agreement, it was provided that the betterments and additions should be owned by the parties equally, not to be used by them jointly in further enterprises of the company as the opinions of the Court of Appeals erroneously supposes, but *to be disposed of* as they might thereafter agree. This is all there is of it. But if I have been able to catch the meaning of the Court of Appeals from a perusal of its opinion upon this branch of the case, that court seems to have found in this article convincing evidence of its conclusion that Crimp was to become permanently interested in the McCormick Construction Company as a stockholder, and that the business relations of the parties were to continue indefinitely. I do not wish to criticise the opinion in this respect further than to say that such an inference or conclusion is utterly inadmissible. I will ask the court, however, further to observe that Article XII strongly confirms the construction of Article V already urged, viz.: that the ninety-nine shares of stock were thereby pledged to Crimp as security for the guaranteed profits of $25,000, and nothing more.

The addition to the agreement following the sworn schedule of assets and liabilities, which is without date and signed only by Crimp and McCormick individually, simply fixes a time when the principal agreement shall begin to operate, and is unimportant.

V.

It has been insisted by some of the counsel for appellees in the course of this litigation, following the second finding of Master Booth (Rec., 101), that the pledging of the Drainage Contract was illegal and void as to creditors of the Construction Company; also that the provision for and guaranty of profits to be realized by Mr. Crimp was a provision for usurious interest, if the sum of $25,200 was intended to be an advance or loan of money. The latter proposition is easily disposed of for the purposes of this case. There is no usury law in force, certainly none in the State of Illinois, where the agreement in question was executed, and where it was to be performed, which forfeits the principal of a loan because of a reservation of more than lawful interest. The appellant is here claiming only the principal. Another answer is, that the agreement does not provide for interest upon the $25,200, and it bears no interest as such. The stipulation for profits is by way of compensation for money and services combined, and it does not appear that the compensation agreed upon was either exorbitant or unreasonable.

The proposition that a pledge of the Drainage Contract would be illegal and void as to creditors of the Construction Company is untenable. That contract was an asset of the company, absolutely within its control

and subject to its disposition, except as limited by its own provisions. That it was not legally assignable is of no importance here. It was transferable equitably to the extent of passing to the transferree a right to the money to be realized by its performance, or from the sale of the contract itself, if such a sale should be made. In this respect it was like any other *chose* in action. The general creditors as such had no lien or claim upon this contract. In a general sense the contract was property, which the company held "as an entity, distinct from its stockholders as from its creditors." The company was a "*going concern*," and upon the showing of assets and liabilities made by McCormick, even including the claim of $10,000 or $11,000 afterwards preferred by McCormick himself, was apparently solvent. Under such circumstances the company violated no obligation it was under to either its stockholders or creditors by pledging the contract to Crimp, especially as the pledge was made for the purpose of raising money with which to pay the creditors. This is the result of the opinion of this court in the case of *Hollins* v. *Brierfield Coal and Iron Company*, 150 U. S., 371, in which the loose *dicta* of courts and text writers in relation to the trust character of corporate property seem to be crystallized into a consistent and intelligible theory, which well deserves to be adopted and upheld as the settled doctrine by all courts and commentators upon this branch of the law.

## VI.

### THE OPINIONS OF THE CIRCUIT COURT OF APPEALS.

I will say again of those opinions what I have said before, viz: That the method adopted by the court for ascertaining the intention of the parties and determining the right construction of the agreement of July 24, 1893, was a method necessarily leading up to unjust conclusions, if not to absolute absurdities. I have said "*the method adopted.*" It should have been "*the want of method,*" notwithstanding it is insisted in particular cases, that there is a "method in madness." The whole of the first opinion conveys the impression of a labored effort to sustain the findings of Master Booth and the orders of the Circuit court confirming his report and overruling the appellant's exceptions thereto. The agreement which was before the court for construction does not seem to have been considered as a whole, and the ordinary rules of construction, adopted to assist in elucidating and harmonizing its various provisions, were not observed or applied: but instead thereof, particular articles, sentences, phrases and words are seized upon and their literal reading and meaning pushed forward as conclusive, not of the intension of the parties or the proper construction of the instrument, but of the judgment which the court should render. The court seems not to have troubled itself about the intention of the parties or the proper construction of the paper they signed, or anything else except to reach a judgment of affirmance. As an illustration—it fastened upon the word "*paid,*" as applied to the $25,200 in the first article, and is utterly oblivious to the fact that the words "*invested*" and "*advanced*"

are in other parts of the agreement applied to the same sum of money. No effort is made to ascertain which of these words best accords with the intention of the parties, as gathered from the tenor and scope of the whole agreement. The opinion also stumbles frightfully but hesitatingly over the tenth article, and whether the court intended or not to decide, that in case of a failure of the Construction Company and McCormick to perform the agreement on their part, Crimp must go away content with the ninety-nine shares of stock and nothing more, it is difficult to tell from the reading of the opinion, and the explanation attempted in the second opinion, does not explain. The opinion needs construction quite as much as the agreement. The conclusion of the court, however, seems to be that, as to the stock, the transaction between the parties amounted to a *conditional sale*, that is, a sale by McCormick to Crimp upon an agreement by McCormick that he would buy it back at the same price, *provided* the parties fully performed the agreement. The exact language of the opinion in this respect is: "But we do not think that the theory of a "loan is tenable. We are of opinion on the contrary, "upon the face of the agreement, unaided by extrinsic "evidence, the advancement which Crimp undertook to "make must be regarded as the price of 126 shares of stock purchased. The purchase was a conditional "one; that is to say, it was upon an agreement to "resell to the vendor, who bound himself to re-purchase "at the original price, provided the other parts of the "agreement were duly performed."

Is it possible, that after the agreement was signed and the money advanced by Crimp, the company and McCormick could abandon performance of the drainage

contract and by their own wrongful act force upon Crimp a forfeiture of all the money advanced by him and compel him, under Article V, to accept the ninety-nine shares of worthless stock in full satisfaction for his advances and guaranteed profits. It is impossible, and yet such is the effect of the judgment of the lower court.

As already stated, the second opinion seems to have been prepared for the special purpose of comments upon the language of the petition for rehearing, directed to this and other conclusions of the court. Those comments are, perhaps, legitimate, and not entirely without provocation. That man, however, is but a poor soldier who is unable to bear the recoil of his own gun, or is made deaf by the echo of his own voice. It was the privilege of the court to stop its quotation from the petition when it pleased, and it exercised that privilege. There are some propositions which can best be answered by a positive denial, and it is fair, although perhaps not altogether courteous to say, that there is not a single element of what is rightfully denominated a conditional sale in the entire agreement of July 24, 1893, unless we class all mortgages, conveyances in trust and by way of pledge, and all sales which do not vest in the vendee the absolute legal and equitable title, under that head. In making this statement I regard it as wholly immaterial what Hilliard may have said in his treatise upon mortgages, or some court or judge may have said *arguendo*, in the course of an opinion. It is not everything that can be read out of a treatise or a decision, that must be accepted as good law or good sense. In this case, however, it is easy to convict the Court of Appeals of a serious error, by the very reference which it makes in support of its conclusions to the decision of this court in the case of *Russell* v. *Southard*, 12 Howard, 139.

The position of the Court of Appeals is, that the transaction between Crimp and the Construction Company and McCormick, as to the $25,200, *was not* a loan of money, but was a sale of 126 shares of the stock of the company belonging to McCormick, with an agreement on the part of McCormick to purchase back the stock at the same price, and this it calls a conditional sale.

The case of *Russell* v. *Southard* presented exactly the facts found by the Court of Appeals, and in the opinion (p. 151) Justice CURTIS, speaking for the court, says: "Doctor Johnston was the subscribing witness to the "written memorandum. He testifies that 'James "Southard and Gilbert C. Russell, I think, on the same "day, presented the agreement and asked me to wit- "ness the same, which I did. My understanding of "the contract was both from Southard and Russell, and "my distinct impression is that Russell was to pay the "money in four months, and take back the farm.' The "intelligence and accuracy, as well as the fairness of "the witness, are not controverted, *and if he is believed, "the transaction was a loan of money upon the security "of the farm.* It is the opinion of the court that such "was the real transaction." The Court of Appeals in the present case finds from the agreement alone the same conditions of fact, which this court in the Russell-Southard case found from the memorandum there before the court, aided by extrinsic evidence. This court said that the facts *constituted a loan of money* on the security of the farm. The Court of Appeals says, under the same facts: "*We do not think the theory of a loan is "tenable.*" Which is right? The nature and essence of right reasoning are the same to-day that they were in 1851. When all the parts of a subject are accurately

defined, no particular harm can result from calling it by a wrong name. The clever scientist will place it in the class to which it naturally belongs, without regard to the name with which it may be labeled. It is submitted that in this case the Court of Appeals has seriously erred, not only in its nomenclature, which is, perhaps, of little importance, but also, in the methods of investigation which it adopted for ascertaining the intentions of the parties and in the conclusions it reached, as to their intentions, and the construction and effect of the agreement which they executed.

Much of this argument, like all others that have preceded it in this case, have been devoted to those provisions of the agreement of July 24, 1893, which relate especially to the worthless stock of the McCormick Construction Company. The same is true of the opinions of the Court of Appeals. This is made necessary by the fact, that the stock was, in the beginning, a prominent feature in the arrangement of the parties, and the provisions of the agreement relating to it are constant factors to be considered in any honest endeavor to ascertain the intention of the parties and the true construction of the instrument they signed. The fate of the drainage contract and its proceeds, to some extent at least, hinges upon the provision relating to the stock and certainly upon the decision of the question, whether the $25,200 was an actual payment to the company for the purchase of 126 shares of McCormick's stock, as Master Booth found and the Circuit court by confirming his report adjudged and decreed, or whether it was an advance or loan of so much money to the company for the repayment of which McCormick pledged his stock. If the former was the fact, then no indebtedness to Crimp was

created by the transaction and for that money Crimp has no remedy except through the stock. If the latter was the fact there was an indebtedness created in favor of Crimp and his representatives to the full extent of the advance, for which he received and held the stock and the drainage contract as a pledge or security. This latter conclusion is and has been the contention of the appellant, and it is insisted that the Court of Appeals erred in holding otherwise.

One other consideration deserves at least to be mentioned. It is a maxim, that the law favors the diligent party. It is but a natural conclusion from the record in this case that the funds now in the hands of the receiver, resulting from the sale of the drainage contract, were realized through and as a consequence of the action taken by and on behalf of the appellant. But for her action and the efforts made in her behalf, the drainage contract would, doubtless, have been forfeited by the Sanitary Board, and thereby have been made a worthless document. As the rulings and judgments of the courts now stand, she has by her own efforts and at her own expense, developed a value to this instrument, to the extent of the price for which it was sold by the receiver, almost entirely for the benefit of other persons to whom she owed no duty, and was under no obligation. In her original bill, she set forth enough of the facts to show to the court the condition in which she was placed, and the causes which led up to and were the occasion of that condition, and, by the general prayer, asked for such relief as the court should find she was equitably entitled to. By her amended and supplemental bill she brought to the attention of the court the fact that certain parties had made offers to purchase the

drainage contract, and prayed that the same might be sold as the only means of realizing anything therefrom. The Construction Company and McCormick evidently ceased to struggle after the filing of their answer. The general creditors were expending their efforts over their mortgages upon the machinery, tools, supplies, etc., which constituted the plant of the Construction Company, the proceeds of which they have already secured. It appears in the record, that Smith and Eastman who purchased the drainage contract, had been partners of Mr. Crimp, and it is fair to infer that it was through their efforts as the friends of Mrs. Crimp, that the drainage contract was saved from forfeiture and made a valuable and available asset. The conditions in which she was placed were not of her seeking, nor were they the result of any fault on the part of her husband and testator. They were the consequence of the defaults, neglects and dishonesty, not to say criminality of those with whom Mr. Crimp had been drawn into association under the agreement of July 24, 1893. All those circumstances the courts below have constantly ignored. Are they deserving of no consideration? The Court of Appeals has said that Mrs. Crimp as executrix can have no standing in court except on the basis of the July agreement. It is true, that but for that agreement and the entanglements growing out of it, she would have had no need of the assistance of a court or any standing in court to question the acts of the Construction Company or interfere in the disposition of its assets. To this extent and no farther is the opinion of the Court of Appeals, in this respect, admissible. That the agreement is the substantive cause of the appellant's trouble is conceded; but that she would be without remedy if the

agreement was set aside as fraudulent, or held not to be enforcible against her by reason of the subsequent misconduct of the Construction Company and McCormick, cannot be admitted. In the case of *Pullman Palace Car Co.* v. *Central Transportation Co.*, Fed. Rep., for April 7, 1896, (Vol. 72) at page 218, Judge BUTLER said: "The lease under which the parties acted was void, "*but this did not render the parties' acts void.*" So, here, if the agreement of July, 1893, was declared fraudulent and void, the acts of the parties would stand, and from those acts, the court would determine their rights. After the performance of the drainage contract had been abandoned the appellant by her own acts and proceedings developed the fact that the contract itself, which, as is insisted, came into her hands as security, was still valuable and convertible into money. Is it equitable that she should lose the benefit of that which she has created? To give her this would be but acting upon existing conditions brought about by the entire failure of the Construction Company and McCormick to carry out on their part the agreement of July 24, 1893, upon the faith of which the $25,200 was advanced by Mr. Crimp. It would be adjusting equities under circumstances which could not have been within the reasonable contemplation of the parties when that agreement was executed. It would be applying to this case the doctrine laid down by this court in the case of the *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Hoyt*, above referred to. The allegations and prayer of the appellant's bill are broad enough to include this kind of relief if the necessities of the case require it. This view of the case practically ignores the special provisions of the agreement of July, 1893, and suggests action by the court upon a

state of fact brought about by an actual abandonment of that agreement. It is presented, however, without prejudice to the right of the appellant to have the proceeds of the sale of the drainage contract applied to the payment of her claim of $25,200 under the provisions of that agreement properly construed and understood.

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